Filed 1/17/19 In re C.D. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.D. et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.M. et al, Defendants and Appellants.	B286358 (Los Angeles County Super. Ct. No. CK46066)

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Affirmed.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant C.M.

Terence M. Chucas, under appointment by the Court of Appeal, for Defendant and Appellant R.D.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

In July 2014, children C.D., R.D., and S.D. were detained from C.M. (mother) and R.D. (father). After three years, during which mother and father received 21 months of reunification services, the juvenile court declined to return the children to their parents' care and terminated reunification services. Mother and father allege the court improperly placed the burden of proof on them under the incorrect statutory framework and that substantial evidence does not support the court's finding that returning the children to the parents' care would be detrimental. Mother also alleges the Los Angeles County Department of Children and Family Services (DCFS) did not make reasonable efforts to provide her with reunification services.

Although we conclude the trial court may have conducted the July 2017 review hearing under the incorrect statute, we find mother and father have forfeited the argument by failing to object in juvenile court. We conclude the error was harmless as, under the more rigorous standard urged by parents, substantial evidence supports the court's finding that returning the children would be detrimental. We also conclude that any failure by DCFS to provide all court-ordered services to mother was cured by the 21 months of services she did receive. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In April 2013, DCFS received a referral alleging mother and father of C.D. (then age eight), R.D. (then age four), and S.D. (then age 11 months) would binge on crack cocaine and alcohol in the bedroom. The children were often dirty and "left alone to fend for themselves." Father was verbally and physically abusive toward mother. In April 2012, father beat a dog nearly to death.

When police arrived to investigate the incident, mother took the blame and went to jail for one week. Father then beat an elderly woman who lived in the family home at the time because she opened the door for the police, which led to mother's arrest. In addition, mother reportedly had lost custody of a total of six children in different states.

DCFS initially provided family maintenance services without seeking to remove the children. The record reflects that on at least three separate occasions, father became enraged with the social worker assigned to work with the family and threatened to kill himself in front of the children. In one incident, the father became violent in the DCFS office and threatened physical harm to the social worker. In June 2014, mother's mental health counselor contacted the DCFS social worker and reported that mother appeared to be using drugs and that mother and the children's hygiene had been deteriorating. The counselor also reported that when father came to mother's sessions, he would answer questions, talk for her, and tell her what to say. In addition, DCFS asked father to complete a background investigation because his true identity could not be verified. According to DCFS, father used various aliases, including one associated with a registered sex offender in North Dakota and an arrest for lewd and lascivious acts with a minor under the age of 14. Father repeatedly refused to undergo a background check.

In July 2014, the children were detained from mother and father after the court found true allegations pursuant to Welfare and Institutions Code[1] section 300 that: (a) the parents physically abused the children by striking them with belts; (b) mother had a 13-year history of drug abuse; (c) father had a history of drug abuse and was a current methamphetamine and marijuana user; (d) father had mental and emotional problems, including a history of making suicide threats; and (e) mother had three children who were permanently removed from her care due to her substance abuse.

In August 2014, DCFS filed an amended section 300 petition adding allegations that mother suffered from schizophrenia and bipolar disorder.

By the time of the jurisdictional/disposition hearing in November 2014, DCFS had discovered that mother failed to reunify with two children in Florida; father was the parent of one of the children and also failed to reunify with the child. Both children had been adopted in Florida. Mother also failed to reunify with a child in California after the child was born with a positive toxicology screen for cocaine. Father failed to reunify with three children who were removed from his care in New Jersey and parental rights had been terminated as to all three children. In addition, father continued to refuse to complete a background investigation despite repeated attempts by DCFS to assist him.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

At the jurisdictional/disposition hearing in November 2014, the court took jurisdiction over the children and removed them from mother and father's custody. After hearing argument, the court also denied reunification services to both parents, citing section 361.5, subdivisions (b)(10), (b)(11), and (b)(13) with respect to mother and section 361.5, subdivisions (b)(11) and (b)(13) with respect to father.[2]

The court set a section 366.26[3] selection and implementation hearing for March 23, 2015. The hearing was continued multiple times. In the interim, mother and father

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[2] A court may deny reunification services under section 361.5, subdivision (b)(10) if a court previously ordered termination of reunification services for any sibling of the children and, under subdivision (b)(11) if the parental rights of a parent over any sibling of the children had been permanently severed. Under both subdivisions, the court must also find that the parent had not subsequently made a reasonable effort to treat the problems that led to removal. Under section 361.5, subdivision (b)(13), a court may deny reunification services when a parent "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

[3] A section 366.26 hearing is held after the denial or termination of reunification efforts. At the hearing, the court selects a permanent plan for the child and may terminate parental rights.

submitted section 388[4] petitions requesting family reunification services and asking the court to return the children to either mother or father's care. Mother alleged in her petition that she completed a mental health assessment, anger management and parenting classes, and was participating actively in a drug treatment program. Father alleged he completed a substance abuse program, was testing negative for illicit substances, was attending substance abuse aftercare services, and was participating in mental health counseling. After a hearing on November 18, 2015, the court granted the petitions in part, ordering six months of reunification services to both parents but denying the request the children be returned to the care of either parent.

The court ordered mother to continue her substance abuse and mental health services, to participate in conjoint counseling with R.D. and C.D., and to participate in PCIT[5] services with S.D. The court ordered father to continue in substance abuse and counseling services, and ordered him to participate in a DCFS-approved 52-week domestic violence program, receive an assessment for psychotropic medication, and participate in

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[4] Under section 388, subdivision (a)(1), a parent "may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made." The court shall grant such a hearing "[i]f it appears that the best interests of the child . . . may be promoted by the proposed change of order." (§ 388, subd. (d).)

[5] According to mother's opening brief, PCIT stands for "parent child interactive therapy."

conjoint counseling with R.D. and C.D. and PCIT with S.D. The court advanced and vacated the section 366.26 hearing, and set a review hearing for May 18, 2016.

The review hearing was continued multiple times due to DCFS's failure to provide appropriate notice, and finally convened on August 24, 2016. At the hearing, DCFS recommended the court terminate reunification services and set a section 366.26 hearing. Mother and father opposed the recommendation and the court set a contested hearing, which was ultimately completed on July 14, 2017. At the hearing, the court terminated reunification services for both parents, found that a section 366.26 hearing was not in the children's best interest, and set the permanency plan as long term foster care.

DISCUSSION

Mother argues that the court erred in conducting the July 2017 review hearing under section 366.3 rather than under the reunification review statutes. According to mother, the distinction is important because under section 366.3, the parent bears the burden of proof of showing by a preponderance of the evidence that further reunification efforts are the best alternative for the child, whereas under sections 366.21 and 366.22, DCFS bears the burden of proof to establish detriment to the children. Mother also argues that substantial evidence does not support the trial court's detriment finding and that DCFS failed to provide her with reasonable services. Father joins mother's arguments and alleges substantial evidence does not support the court's determination that his conduct created a substantial risk of detriment to the children.

A. Relevant Legal Background

"A parent's interest in the companionship, care, custody and management of his children is a compelling one, ranked among the most basic of civil rights." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Likewise, the welfare of a child "is a compelling state interest that a state has not only a right, but a duty, to protect." (*Id.* at p. 307.) In most cases, when a child has been removed due to abuse or neglect, the state should provide the parent with services to assist him or her in overcoming the problems that led to removal. (*Id.* at p. 308.) When it does, the Welfare and Institutions Code requires that the court conduct status review hearings at six, 12, and 18 months from the date of disposition. At these hearings, the court determines whether to return the child to the parents' care or terminate reunification services and set a section 366.26 hearing. (§ 366, subd. (a)(1).) At each review hearing during the reunification period, the court must return the child to the parent unless DCFS proves that doing so would create a substantial risk of detriment to the child. (§§ 366,21, subds. (e)(1) & (f)(1), 366.22, subd. (a)(1).) The court must also make a finding at each review hearing under section 366 as to whether the agency made reasonable efforts to provide services to the parents. When viewed as a whole, this statutory dependency scheme "provides the parent due process and fundamental fairness while also accommodating the child's right to stability and permanency." (*In re Marilyn H.*, at p. 307.)

If the agency establishes that returning the children to the parents would create a substantial risk of detriment at any of the review hearings, the court must then shift its focus to "the needs of the child for permanency and stability." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) From that point on, there is a

"rebuttable presumption that continued foster care is in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The court schedules a section 366.26 hearing to establish a permanency plan. After a permanency plan has been established at the hearing, review hearings are held every six months pursuant to section 366.3. Unless parental rights have been terminated, the court may order further reunification services under section 366.3, subd, (f) for a period of up to one year if the parents prove by a preponderance of the evidence that further efforts at reunification would be the best alternative for the child.

A parent does, however, have one "escape mechanism" from a permanency plan that terminates parental custody: he or she may petition the court to prove "changed circumstances pursuant to section 388 to revive the reunification issue." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) Section 388 "provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*In re Marilyn H.*, at p. 309.)

If a court orders reunification services after previously denying them and before conducting a section 366.26 hearing, the next hearing should be set for and conducted under the standards of a section 366.22 hearing, not as a continued section 366.26 hearing. (*In re Sean E.* (1992) 3 Cal.App.4th 1594, 1599.)[6]

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[6] See also Dependency Quick Guide A Dogbook for Attorneys Representing Children and Parents, prepared by the Judicial Council of California and linked to the California Judicial Branch website at <http://www.courts.ca.gov/documents/dogbook.pdf> (as of January 17, 2019).

Generally then, to sum up, until the time the court establishes a permanency plan under section 366.26, the burden remains with the state to prove a substantial risk of detriment to the children if they are returned to their parents. After the court establishes a permanency plan under section 366.26, the burden shifts to the parents to prove that reunification would be in the best interests of their children. (*In re Jacob P.* (2007) 157 Cal.App.4th 819, 829.)

This is a very general statement. The rub in our case is that the section 366.26 hearing to establish a permanency plan is supposed to occur at the 18-month benchmark. As the *In re Jacob P.* court observed, "Prior to the 18-month hearing, the presumption is a child should be returned to a parent unless there is a substantial risk of detriment. (§§ 366.21, subd. (e), 366.22, subd. (a).) After the 18-month mark, rather than a negative finding of risk preventing return, a positive finding of best interest to return is needed." (*In re Jacob P., supra*, 157 Cal.App.4th at p. 829.)

In our case, three years had passed and there was still no permanency hearing. So, do we hang our hat on the fact that more than 18 months had passed (and therefore apply the best interest standard)? Or do we impose the burden on DCFS because a permanency plan hearing had not yet been conducted, even though so much time had passed? Which standard do we apply? Choosing, for the sake of argument, the standard most favorable to the parents, we determine that the juvenile court should be affirmed.

B. The Court's Detriment Finding

For the reasons below, we conclude mother and father forfeited the claim that the court erred in proceeding under

section 366.3. We further conclude that if the court did err, the error was harmless in that there was substantial evidence, taken as a whole, at the evidentiary hearing to conclude that the court made a finding of detriment, rather than putting the burden on the parents to show best interest.

1. *Forfeiture*

DCFS argues mother and father have forfeited the argument that the court erred in proceeding under section 366.3 by failing to object in the trial court. We agree.

At the November 2015 section 388 hearing, the court initially stated it was going to set a section 366.21, subdivision (e) review hearing six months out. The children's attorney then asked the court, "since you're extending reunification under 366.26, wouldn't it be [an] RPP not a 21 (e)?" The court replied, "You're right. It would be an RPP [review of permanency plan]." Neither mother nor father objected. From that point on, the court, counsel for DCFS, and counsel for both parents stated in open court that they were "in RPP mode" and "not the regular review period," which the parties also referred to as "F.R. mode." And, at the final hearing in July 2017, mother's counsel argued for additional reunification services under section 366.3, which governs section 366.26 review hearings. At no time did mother or father's counsel argue that the court was bound to proceed under the statutes governing the reunification review period rather than the permanency planning statutes.

Appellate courts have applied the waiver doctrine in dependency proceedings in "a wide variety contexts," including where a court sets a section 366.26 hearing after finding DCFS did not make reasonable efforts to reunite a parent with a child. (*In re G.C.* (2013) 216 Cal.App.4th 1391, 1398; *In re Kevin S.*

(1996) 41 Cal.App.4th 882, 885–886.) The waiver rule will not be applied, however, if " ' "due process forbids it." ' " (*In re M.F.* (2008) 161 Cal.App.4th 673, 682.) It may be relaxed when an error " 'fundamentally undermine[s] the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole.' " (*Ibid.*)

We do not find that to be the case here. The court not only exercised its discretion to afford the parents a chance at reunification 16 months after the children were detained, it ultimately fashioned a permanency plan that will allow the parents to earn custody of their children in the future. The court stated it was taking the parents' progress into consideration in choosing not to set a section 366.26 hearing. Further, the court set the permanent plan as long term foster care largely because it acknowledged that "in all of our minds the long term goal is return home." In a statutory framework that requires a court to terminate reunification services after 18 months if the parents have not sufficiently progressed toward reunification, we cannot find that ordering long term foster care after the children have been in care for three years for the purpose of allowing the parents to regain custody in any way violates due process. The parties have thus waived the argument on appeal by failing to object in the trial court.

2. *Harmless Error*

Even if mother and father had not forfeited the argument, we conclude that any error in the proceeding was harmless because substantial evidence, taken as a whole, supports the court's decision to keep the children in foster care rather than return them to their parents.

As to father, the court referred to a recent incident in which father insisted on discussing case-related issues with R.D. during a family visit. According to a DCFS report, father told R.D. that he learned about some aggressive behavior the child recently displayed in her foster home. The social worker intervened and advised the father not to discuss case-related issues during family visits. Father, however, continued to ask R.D. what happened and then told her that her behavior was recently discussed in court and that she could be placed in another foster home away from her sisters if she continued to behave poorly. Despite the social worker's repeated efforts to re-direct father, he persisted in discussing case related issues with R.D. Father's inability to exert emotional control in front of his children was a substantial factor in the children's initial removal and it remained a big problem even after reunification services. The court's remarks make clear that it found it would be detrimental to the children to return to their parents' custody, given that father had not remedied the problems that prompted the detention of the children in the first place. The court stated very bluntly: "[Father], for his part, is still working through his issues. And the court has a concern that given that he has to be – he has to be [redirected] as recently as last week, he is trying to monitor his emotional outbursts, but this is still problematic to the court, given that these are young girls, and given that is why this case was open in the first place."

This constitutes substantial evidence supporting the court's finding that returning the children to father's care would be detrimental.

In addition, we find no evidence in the record that father ever submitted to a background check despite concerns about his past. And, father had not completed his court-ordered domestic violence program. We conclude this constitutes substantial evidence supporting the court's finding that the children would be at risk if returned to father.

As to mother, the court's primary concern was that she had only recently begun to learn how to establish independence from father. The court was not comfortable sending the children home to mother because she "worked in the shadows" of father and was subservient to his domineering personality. There was conflicting evidence before the court about a March 2017 incident in a family therapy session in which father became upset and had to leave the room. According to the social worker who was waiting outside the counseling session, the DCFS social worker spoke with the therapist, who reported father had an "outburst" in front of the children, causing C.D. and R.D. to cry. The report indicates that mother "s[a]t idly" by during father's outburst, and that mother and the therapist had not yet had an opportunity to focus on mother's ability to protect the children emotionally when father acts out verbally.

The therapist testified at the July 2017 hearing, and stated she did not believe father had an "outburst" or that mother "sat idly" by when he became upset in the therapy session. According to the therapist, however, mother did not reach out to console the children until after father left the room. The therapist also testified that she had not yet had an opportunity to work directly with mother on how to protect the children emotionally.

The court commented on these differing accounts regarding mother's response to father's behavior at the therapy session,

noting that while the social worker was not in the room with the family, she was present when father walked out of the session. In reviewing the record for substantial evidence, we must do so in the light most favorable to the court's determinations and defer to the court's credibility determinations. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) We therefore do not question the court's assessment of the different evidence with respect to mother's behavior at the therapy session or its conclusion that mother was not yet strong enough to escape father's influence. We also note that mother did not begin to focus her attention on the children until father left the room, and had yet to begin working with the therapist on learning how to effectively care for her children's emotional needs in the face of father's anger. We therefore conclude that substantial evidence supports the court's determination that returning the children to mother's care would be detrimental.

C. Reasonable Efforts

Mother argues that DCFS failed to provide her with reasonable services because DCFS never provided mother with PCIT services and did not facilitate approximately half of her court-ordered visits. Mother fails, however, to show that she suffered any prejudice from this deficiency in services.

The record reflects that DCFS attempted to refer S.D. and mother to an agency for PCIT services, but was informed that such services are for parents who have reunified with their children. We find no evidence in the record that DCFS attempted again to secure the services for mother and S.D. With respect to visitation, the court and all parties acknowledged that DCFS failed to provide the family with many court-ordered visits, especially between S.D. and the parents. Despite these

deficiencies, however, the parents ultimately received a total of 21 months of services. We agree with the trial court that any deficiencies on the agency's part were "cured" by the 21 months of services the parents did receive, which was far beyond what the Legislature envisioned in enacting the dependency scheme.

In addition, mother has not shown us how or why the outcome would have been any different for her had she been provided more visits and PCIT services. The court based its detriment finding on mother's lack of independence from father and continued willingness to live in his shadow. Mother has not provided us with any facts or argument establishing how PCIT services with S.D or increased visits with the children would have improved her ability to establish independence from father.

DISPOSITION

The order is affirmed.

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.